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No. 98-540

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JULIETTE IRVING, as Guardian of the Person and Property of Bryana Bashir, and as Administratrix of the Estate of Bonita L. Irving, Deceased,
Petitioner,

v.

MAZDA MOTOR CORPORATION; MAZDA (NORTH AMERICA), INC.; MAZDA MOTOR OF AMERICA, INC.; and AUTOALLIANCE INTERNATIONAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

LANNY B. BRIDGERS *
ANDREW T. BAYMAN
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Attorneys for Respondents
* *Counsel of Record*

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Eleventh Circuit that held petitioner's tort claim, which alleged that respondents' 1990 Mazda MX-6 was defectively designed because it was equipped with a "passive" occupant restraint system expressly permitted to be used under the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 and because it allegedly failed to warn that the "passive" occupant restraint system permitted under federal law constituted a "defect" under Georgia law, was preempted by the National Traffic and Motor Vehicle Safety Act because the claim conflicted with Federal Motor Vehicle Safety Standard 208, even though (1) the Eleventh Circuit's decision is consistent with this Court's preemption decisions and all other federal courts of appeals' decisions addressing this issue; (2) the Eleventh Circuit's decision is consistent with both Congress' intent as expressed in 15 U.S.C. §§ 1392(d) and 1397(k), and the elementary rule of statutory construction which directs that an act cannot be held to destroy itself; and (3) the factual context to which this Court's decision would be limited is an ephemeral one.

RULE 29.6 STATEMENT

MAZDA MOTOR CORPORATION

(1) Mazda Motor Corporation has no parent company.

(2) Mazda Motor Corporation owns the following subsidiaries:

Mazda Motor of America, Inc.
Mazda Motors (Deutchland) GmbH
Mazda Canada Inc.
Mazda Australia Pty. Ltd.
Eunos Inc.
Autozam Inc.
Mazda Chuhan Co., Ltd.
Kurashiki Kako Co., Ltd.
Mazda Credit Corporation
Malox Co., Ltd.
Toyo Advanced Technologies Co., Ltd.
AutoAlliance International, Inc.
AutoAlliance (Thailand) Company Limited
Ford Sales Japan Ltd.

MAZDA (NORTH AMERICA), INC.

(1) Mazda (North America), Inc.'s parent company was Mazda Motor Corporation until Mazda (North America), Inc. ceased to exist on October 1, 1997.

(2) Mazda (North America), Inc. did not own any nonwholly owned subsidiaries as of September 30, 1997.

MAZDA MOTOR OF AMERICA, INC.

(1) Mazda Motor of America, Inc.'s parent company is Mazda Motor Corporation.

(2) Mazda Motor of America, Inc. owns no subsidiaries.

AUTOALLIANCE INTERNATIONAL, INC.

(1) AutoAlliance International, Inc.'s parent companies are Mazda Motor Corporation and Ford Motor Company.

(2) AutoAlliance International, Inc. owns no subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	2
A. The Safety Act and FMVSS 208	2
1. The Volkswagen and Toyota-Cressida Systems	5
2. The U.S. Department of Transportation's Approval of These Systems	6
3. The Passive Restraint System in the 1990 Mazda MX-6	9
B. Factual and Procedural Background	10
C. The Eleventh Circuit's Decision	12
REASONS FOR DENYING THE PETITION	13
A. The Eleventh Circuit's Decision Is Correct And Consistent With Other Federal Appellate Courts' Decisions on Preemption	13
1. The Court of Appeals Correctly Found That The Safety Act's Provision Negating A "Government Standards" Defense As A Matter of Federal Law Did Not Preclude Implied Preemption Analysis	15
2. The Court of Appeals Correctly Concluded That Petitioner's Claims Would Frustrate the Objectives of the Safety Act, Disrupt the Methods Carefully Chosen By The Federal Government for Achieving Those Objectives, and Impose Liability on Respondents For Doing What FMVSS 208 Authorized Them To Do	17

TABLE OF CONTENTS—Continued

Page

a. Petitioner's Proposed Common Law Standards Would Effectively Foreclose A Federally-Approved Option 18

b. Petitioner's Proposed Standards Would Eviscerate the NHTSA's Ability to Meet the Congressionally-Mandated Objective of Prescribing Standards for Motor Vehicles in Interstate Commerce 20

c. Petitioner's Proposed Standards Would Wreak Havoc, Retrospectively, on the Federal Government's Phase-In of Passive Restraint Systems 20

B. The Eleventh Circuit's Decision Gives Effect to Congress' Intent As Expressed in 15 U.S.C. §§ 1392(d) and 1397(k), and to the Rule of Construction Directing That An Act Cannot Be Held to Destroy Itself 21

1. The Language and Structure of the Safety Act Provide Reliable Indicia of Congress' Intent That § 1392(d) Serve As A Meaningful Preemption Clause and That the "No-Compliance-Defense" Provision of § 1397(k) Not "Save" Otherwise Preempted Claims.... 23

2. Congress' Intent In Providing For Preemption Under the Safety Act Is Wholly Consistent With The Rule That An Act Should Not Be Held To Destroy Itself 27

C. The Question of Whether FMVSS 208 Preempts Claims Such As Petitioner's Will Become Increasingly Rare and Unimportant By Virtue of FMVSS 208's Currently-Effective Mandatory Air Bag Rule and Thus Does Not Merit Review By This Court 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page

American Tel. and Tel. Co. v. Central Office Tel., Inc., —— U.S. ——, 118 S. Ct. 1956 (1998) 14, 28
Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) 14, 22-24
Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) .....*passim*
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 11, 28
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 14
Doyle v. Volkswagenwerk Aktiengelellschaft, 81 F.3d 139 (11th Cir. 1996), *on remand*, No. 91:CV-1926A-JEC (N.D. Ga. Sept. 29, 1998).... 13, 14
Felder v. Casey, 487 U.S. 131 (1988) 16
Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 15, 17, 18
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).. 11, 14-16
Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 16
Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291 (7th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 697 (1998) 13, 26
Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997) 13, 26, 27
I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 25
Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998) .....*passim*
Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990)..13, 14, 29
Maryland v. Louisiana, 451 U.S. 725 (1981) 12
M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) 12
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) .....*passim*
Montag v. Honda Motor Co., Ltd., 75 F.3d 1414 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 61 (1996) 13, 19, 29

TABLE OF AUTHORITIES—Continued

Page

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm, 462 U.S. 29 (1983) 7, 8
O'Bryan v. Volkswagen of Am., Inc., 838 F. Supp. 319 (W.D. Ky. 1992) 19
Perry v. Mercedes-Benz of N. Am., Inc., 957 F.2d 1257 (5th Cir. 1992) 19
Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) 13, 19, 29
Public Citizen v. Steed, 851 F.2d 444 (D.C. Cir. 1988) 9
State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) 8, 9
Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) ....*passim*
Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, *pet. for reh'g denied*, 516 U.S. 1154 (1996) 30
Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 28
Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) ..14, 19, 30
Zimmerman v. Volkswagen of Am., Inc., 920 P.2d 67 (Idaho 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 1245 (1997) 30

Constitutional Provisions, Statutes, Regulations, and Rules:

U.S. Const., Art. VI, cl. 2 16
15 U.S.C. §§ 1381-1431 (1966) 3
15 U.S.C. § 1381 ..... 3, 20
15 U.S.C. § 1391(1) 3
15 U.S.C. § 1392(a) and (f) 3
15 U.S.C. § 1392(d) ..... *passim*
15 U.S.C. § 1397(k) ..... *passim*
29 U.S.C. § 653(b)(4) 23
29 U.S.C. § 667(a) 23
29 U.S.C. § 1144(b)(2)(A) 23
42 U.S.C. § 2000e-7 23

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2000h-4	23
46 U.S.C. § 767	23
49 U.S.C. § 1506	23
49 U.S.C. § 30103(c)	24
Pub. L. No. 102-240, § 2508, 105 Stat. 1914 (1991)	4, 20, 30
49 C.F.R. § 571.208, S2	3
49 C.F.R. § 571.208, S4.1.2.1 through S4.1.2.3	4, 10
49 C.FR.. § 571.208, S4.5.3	4, 5, 10
49 C.F.R. § 571.208, S5.1	5
Miscellaneous:	
H.R. Rep. No. 89-1776 (1966)	25
H.R. Rep. No. 89-1779 (1966)	2, 3
H.R. Rep. No. 89-1919 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731	25
H.R. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783	4
S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709	2, 26
S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1352	24, 27
112 Cong. Rec. 21, 487 (1966)	26
39 Fed. Reg. 3834 (1974)	5
41 Fed. Reg. 24070 (1976)	7
42 Fed. Reg. 5071 (1977)	7
42 Fed. Reg. 34295 (1977)	7
46 Fed. Reg. 12033 (1981)	7
46 Fed. Reg. 21174 (1981)	7
46 Fed. Reg. 53419 (1981)	7
49 Fed. Reg. 28962 (1984)	*passim*
Letter from Paul Jackson Rice, Chief Counsel, Nat'l Hwy. Transp. Safety Admin., to Rembert Ryals, Esq. (Sept. 10, 1990)	6
Letter from Paul Jackson Rice, Chief Counsel, Nat'l Hwy. Transp. Safety Admin., to Robert S. McLean, Esq. (June 5, 1992)	6
Webster's Ninth New Collegiate Dictionary 434 (1986)	27

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RESPONDENTS' BRIEF IN OPPOSITION

At bottom, Petitioner asks this Court to review one painfully mundane question—whether, when a proposed state common law standard conflicts with federal law by penalizing a defendant for doing precisely that which it was authorized to do under federal law, the Supremacy Clause of the Constitution renders that proposed state law "void" and "without effect." (*See* Pet. at 11-18). Petitioner argues that the Supremacy Clause may not operate as its plain words suggest in the context of the

National Traffic and Motor Vehicle Safety Act ("the Safety Act") and Federal Motor Vehicle Safety Standard ("FMVSS") 208, which sets forth permissible occupant restraint systems, because this Court has directed that express preemption clauses should be construed narrowly and because the Safety Act contains a so-called "savings clause" that Petitioner believes should preserve state law that conflicts directly with the Safety Act and regulations promulgated under it.

The true question presented by Petitioner for review and answered adversely by this Court time and again is not deserving of the Court's discretionary powers. Nor are the merits of Petitioner's arguments deserving of the Court's consideration. The Court of Appeals below correctly held that Petitioner's claim alleging that the automatic shoulder belt and manual lap in the Mazda MX-6 constituted a defect was impliedly preempted where federal law specifically authorized Mazda to install an automatic shoulder belt and manual lap as a means of complying with the Safety Act and FMVSS 208. This Court repeatedly has applied the principle that "a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20 (1981). It need not waste its discretionary powers repeating itself here.

STATEMENT OF THE CASE

A. The Safety Act and FMVSS 208

Congress in 1966 determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle standards that were "strong and adequately enforced," and "uniform throughout the country." S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720; *see* H.R. Rep. No. 89-

1779, at 17 (1966). Accordingly, Congress enacted the Safety Act, 15 U.S.C. §§ 1381-1431. The Act directs the Department of Transportation (the "Department"), and its subdivision, the National Highway Traffic Safety Administration ("NHTSA") to issue Federal Motor Vehicle Safety Standards that are "practicable . . . meet the need for motor vehicle safety," and "carry[] out the purposes of [the Act]." 15 U.S.C. § 1392(a), (f) (1966).[1] Federal Motor Vehicle Safety Standards must "prevent any unreasonable risk of death or injury" in the event of an accident. 15 U.S.C. § 1391(1) (1966).

FMVSS 208 sets forth federal performance requirements for the protection of automobile occupants involved in crashes. Its stated purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, *and by specifying equipment requirements for active and passive restraint systems.*" 49 C.F.R. § 571.208, S2 (1996) (emphasis added). Toward this end, NHTSA devised a regulatory scheme within FMVSS 208 that encouraged manufacturers in the 1990 model year to provide the public with a choice of several specified restraint options. These options served the purposes of the Safety Act by reducing injuries via injury criteria, striking the desired degree of uniformity to satisfy the demands of interstate commerce, allowing for the type of flexibility that fosters research and development of improved restraint systems, and increasing consumer acceptance of passive restraints.

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[1] Congress declared that because the purpose of the Act was to reduce deaths and injuries to persons resulting from motor vehicle accidents, it was "necessary to establish motor vehicle safety standards for motor vehicles and [motor vehicle] equipment in interstate commerce [and] to undertake and support necessary safety research and development." 15 U.S.C. § 1381 (1966).

Quite deliberately, the scheme within the FMVSS 208 applicable to the 1990 Mazda MX-6 did not mandate that manufacturers choose one form of passive restraint over another. *See* 49 Fed. Reg. 28962, 28999-29000 (1984); 49 C.F.R. § 571.208, S4.1.2.1 through S4.1.2.3. (1975).[2] Rather, it set forth performance requirements for specified passive restraint options, and with respect to passive belts, provided for a very specific system—namely, a manufacturer could install "a seat belt assembly that requires no action by vehicle occupants" (an automatic belt system) "to meet the crash protection requirements of any [of the first three options] and in place of any seat belt assembly otherwise required by that option." 49 C.F.R. § 571.208, S4.5.3 (1975). Thus, FMVSS 208 authorized the installation of automatic belts that met the performance requirements of any of its three options, and in place of any manual belts at all. This is exactly what the Mazda defendants did when they installed the automatic shoulder belt with a manual lap belt in the 1990 Mazda MX-6.

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[2] Congress in 1991 amended the Safety Act to require air bags in all passenger cars. Congress granted the Secretary until September 1, 1998, to promulgate an amendment to FMVSS 208 requiring air bags in 95% of cars built in the 1997 model year, and 100% of cars built in the 1998 model year. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 2508, 105 Stat. 1914. Congress made clear, however, that its judgment concerning the phase-in of air bags was not to change preemption law with respect to past regulations. H.R. Rep. No. 102-404, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783.

Previously in 1984, then-Secretary of Transportation Elizabeth Dole implemented a rule mandating a "phase-in" of driver's side passive restraints over time, requiring that 10% of 1987 model year vehicles be equipped with passive restraints; 25% of 1988 model year vehicles; 40% of 1989 model year vehicles; and 100% of 1990 model year vehicles. 49 Fed. Reg. 28999-29000. Although the phase-in was in its final stage when this Mazda MX-6 was built, the rule granted manufacturers the option as to what form of passive restraint to install, specifically including the option to install an automatic shoulder belt system with or without manual lap belts.

The Mazda defendants were not at a loss for company in choosing this option. Toyota, Ford, General Motors, Chrysler, and Volkswagen, among others, all used an automatic shoulder belt with or without a manual lap belt on all or some models during the phase-in period. Volkswagen and Toyota, in particular, pioneered the system and paved the way for its widespread popularity.

1. ***The Volkswagen and Toyota-Cressida Systems***

The second option under the applicable FMVSS 208 authorizes passive restraints that, together with manual belts, meet the performance requirements of 49 C.F.R. § 571.208, S5.1. This section sets forth injury criteria for vehicles hitting a fixed collision barrier at thirty miles per hour, at any angle up to thirty degrees.

In 1973, Volkswagen developed a passive shoulder belt system which, with knee bolsters and without any manual lap belt, met those injury criteria. In 1974, NHTSA ruled that Volkswagen's passive belt system was expressly authorized under FMVSS 208's second option. *See* 39 Fed. Reg. 3834 (1974). The NHTSA pointed out that 49 C.F.R. § 571.208, S4.5.3 specifically permitted the use of the Volkswagen system "to meet the perpendicular impact protection requirements of option two." *Id.* As for the lack of a manual lap or lap/shoulder belt, NHTSA likewise pointed out that S4.5.3 expressly permitted the Volkswagen automatic belt system "to replace the required [manual] seat belt assemblies." *Id.* In fact, NHTSA concluded that the second option existed "to accommodate the introduction of passive restraints like Volkswagen's." *Id.*

Thus, ever since the introduction of Volkswagen's system, FMVSS 208 specifically has authorized an automatic shoulder belt that meets its performance requirements, with or without any type of lap belt—manual or automatic. This rule has never changed. Indeed, on Septem-

ber 10, 1990, NHTSA reaffirmed that a restraint system consisting of an automatic shoulder belt and meeting the applicable performance requirements "[is] not required to provide lap belts either as part of the automatic belt or as a separate manual belt." (Br. of Defs.-Appellees App. A (Letter from Paul Jackson Rice, Chief Counsel, National Highway Transportation Safety Administration, to Rembert Ryals, Esq. (Sept. 10, 1990).)[3]

Toyota followed in 1980 and 1981, by developing an automatic shoulder belt system with knee bolsters, like the Volkswagen system, but which also included a manual lap belt for still more protection. It also made the shoulder belt motorized to increase consumer acceptability, and therefore, consumer usage. The Toyota Cressida's automatic shoulder belt had a dramatically higher usage rate than traditional, manual restraint systems and met the dynamic crash and injury criteria of FMVSS 208 even without the lap belt. As a result, the NHTSA in 1980 gave the system's inventor, Masanao Motonami, its Safety Award For Engineering Excellence for his significant contribution to automotive safety, and in particular, for his design of the Cressida's automatic shoulder belt system. Significantly, the NHTSA in 1984 reported that the usage rate for this system was over ninety percent, higher than any other automotive restraint system. *See* 49 Fed. Reg. 28983-84.

2. *The U.S. Department of Transportation's Approval of These Systems*

In the meantime, between 1976 and 1984, each U.S. Secretary of Transportation reaffirmed FMVSS 208's op-

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[3] The NHTSA reaffirmed this finding again in 1992. The NHTSA's Chief Counsel found that because Toyota's system conformed to the performance and design requirements of FMVSS 208, it was expressly permitted under FMVSS 208. (*See* Br. of Defs.-Appellees App. C (Letter from Pauul Jackson Rice, Chief Counsel, National Highway Traffic Safety Administration, to Robert S. McLean, Esq. (June 5, 1992)).)

tions, including the passive restraint option eventually installed in the 1990 Mazda MX-6.

First, Secretary William Coleman in 1976 undertook a comprehensive study of passive and active restraints. Although he determined that it was not appropriate to mandate any form of passive restraints, he nonetheless reaffirmed the manufacturer's right to comply with the requirements of any of FMVSS 208's original three options by means of a passive belt system, specifically including the Volkswagen automatic shoulder belt system with knee bolsters. 41 Fed. Reg. 24070, 36494 (1976); 42 Fed. Reg. 5071 (1977). Indeed, he noted that, to date, only "two passive restraint systems" appeared workable—"air bags and the [Volkswagen] shoulder belt and knee bolster system." 41 Fed. Reg. 24070 n.2, 24072 (1976).

In 1977, Secretary Brock Adams issued a prospective FMVSS 208 requiring some form of passive restraints to be phased into cars beginning with the model year 1982. "[T]he choice of which system to install was left to the manufacturers," however. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm,* 463 U.S. 29, 37 (1983). Secretary Adams also reaffirmed the manufacturer's right to comply with the requirements of any FMVSS 208 passive restraint option by way of an automatic shoulder belt system; he noted that 65,000 Volkswagens were equipped with that system, and lauded it as "a proven means of meeting a passive restraint requirement." 42 Fed. Reg. 34295 (1977).

Secretary Andrew Lewis followed by delaying the mandatory passive restraint phase-in for one year, 46 Fed. Reg. 12033, 12034; 46 Fed. Reg. 21174, 21174-75 (1981), and then rescinding that decision, 46 Fed. Reg. 53419, 53425 (1981). This Court reviewed that rescission decision and, in 1983, remanded it, thereby setting the stage for issuance of Secretary Dole's "final rule," the

version of FMVSS 208 applicable to Petitioner's decedent's 1990 Mazda MX-6. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*, 463 U.S. 29 (1983).

On remand, Secretary Elizabeth Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962, 28962-63, 28984-86, 28991, 28996 (1984), and reached a "final rule." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 478 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The rule called for a phase-in of passive restraint systems over time. Although it did not require manufacturers to install any one kind of passive restraint, it did require some kind of passive restraint in 10% of cars built in the 1987 model year, 25% of cars built in the 1988 model year, 40% of cars built in the 1989 model year, and 100% of the cars built in the 1990 model year (the year in which plaintiff's decedent's Mazda MX-6 was built). 49 Fed. Reg. 28962, 28999-29000.

Secretary Dole determined not to mandate any particular form of passive restraint at any time, during the phase-in or after. She reasoned that each passive restraint system had advantages and disadvantages. For example, air bags had a variety of "technical problems," and were expensive, while automotive belts cost significantly less. 49 Fed. Reg. at 29001. Moreover, she was concerned about "public acceptability" of mandatory passive restraints, given the public's earlier reaction to a since-abandoned "ignition interlock" system. *Id.* Public acceptability would be enhanced, she concluded, by authorizing manufacturers to install different restraint systems, so that consumers could choose among them. *Id.* at 28997, 29001.[4] Secretary Dole concluded that mandating a single type of

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[4] In an eerily prescient statement given some in the public's more recent perception of air bags, Secretary Dole remarked that "[u]nder the rule being issued, if people have concerns about air bags, they can purchase automobiles that use automatic belts." 49 Fed. Reg. at 29001.

passive restraint was not in the public interest, because it would risk "killing or seriously retarding development" of other systems. *Id.* at 29001.

Accordingly, Secretary Dole believed it important to provide "latitude" to the industry with respect to what passive restraints to install in cars; "flexibility" was the benchmark. *Id.* at 28997, 29000. Thus, manufacturers were to have the option to comply with FMVSS 208's passive restraint requirement with any adequate technology. *Id.* at 28997. That specifically and prominently included the option to choose the Volkswagen's automatic shoulder belt system without a manual lap belt, and the Cressida's automatic shoulder belt system with a manual lap belt. Indeed, the Secretary noted that (1) those systems were the only systems in significant use with a proven track record, *id.* at 28965; (2) their usage rates were high, *id.* at 28983-84; (3) they were relatively inexpensive, *id.* at 28989-90; and (4) they were available "immediately," of particular importance during the phase-in, *id* at 28999.

In sum, until air bags were mandatory in all vehicles with model year 1998, FMVSS 208 always permitted manufacturers the option of choosing what passive restraint, if any, to install in their vehicles. *See Public Citizen v. Steed*, 851 F.2d 444, 448 n.5 (D.C. Cir. 1988). Secretary Dole's final version of FMVSS 208 granted manufacturers that same option, and specifically included the highly-commended option to install the Cressida's automatic shoulder belt system with a manual lap belt. The 1984 version of FMVSS 208 was upheld in *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 487-89 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

3. *The Passive Restraint System in the 1990 Mazda MX-6*

Petitioner's decedent's 1990 MX-6 was built during the initial passive restraint phase-in. Respondents exercised the option that FMVSS 208 specifically granted them, and

installed the automatic shoulder belt system with knee bolsters and a manual lap belt that Toyota had developed. Petitioner has asked the district court, the Eleventh Circuit, and now this Court, to declare that system unlawful, notwithstanding Congress' and NHTSA's express authorization of that system and their reasons for authorizing it.

B. Factual and Procedural Background

The one-vehicle accident that precipitated this action occurred on November 19, 1993, when Petitioner's decedent, Bonita L. Irving, was driving her 1990 Mazda MX-6 at high speed on Highway 54 in Coweta County, Georgia. Ms. Irving lost control of her car, allowing it to veer off the highway and roll multiple times. While the car rolled violently, Ms. Irving was ejected; she died instantly upon hitting the ground.

Ms. Irving's Mazda MX-6 was equipped with an automatic restraint system consisting of a motorized or automatic shoulder belt that moved into place around the driver when the driver closed the door and turned the ignition, a device called a "knee bolster" to restrain the lower body's forward movement in a frontal collision, and a manual lap belt. Federal Motor Vehicle Safety Standard 208 expressly granted automobile manufacturers the option of installing an automatic shoulder belt with, or even without, a manual lap belt. *See* 49 C.F.R. § 571.208, S4.1.2.1, S4.5.3 (1988); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 766 (11th Cir. 1998).

Petitioner brought this action claiming that the occupant restraint system used in the MX-6 was defectively designed. Even though FMVSS 208 explicitly authorized a system consisting of an automatic shoulder belt with or without a lap belt, Petitioner alleged that Georgia state law required that the restraint system include a fully passive lap/shoulder (a "three-point") belt or a manual lap/shoulder belt with an air bag. *Irving*, 136 F.3d at 769 n.5.

Once the parties completed discovery in the district court, Respondents moved for summary judgment on the ground that Petitioner's claims were expressly and impliedly preempted. Respondents argued that Petitioner's claims were expressly preempted because Petitioner sought to impose state safety standards that differed from, and in fact, directly conflicted with, applicable federal standards. Respondents also argued that Petitioner's proposed common law standard, as defined by the uncontroverted facts, was impliedly preempted because it would interfere with the methods chosen by Congress and NHTSA to achieve the Safety Act's objectives.

Petitioner argued that neither express nor implied preemption was appropriate. First, Petitioner argued that the Safety Act's language does not support express preemption. Second, invoking the Court's decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), Petitioner argued that implied preemption was foreclosed as a matter of law.

The district court granted Respondents' motion for summary judgment on November 22, 1996. As a preliminary matter, the district court rejected Petitioner's argument that *Cipollone* prevented it from engaging in implied preemption analysis and stated that it would not address Respondents' express preemption argument. (Pet. App. at A15 (Dist. Ct. Order at 4 n.2, 5).) The court then went on to determine that Petitioner's proposed common law standard would, for a variety of reasons, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and was thus impliedly preempted by the Safety Act. (*Id.* at 7-8 (internal quotations and citations omitted).) Petitioner's appeal to the Court of Appeals for the Eleventh Circuit followed.

C. The Eleventh Circuit's Decision

On appeal, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of Respondents, concluding that "[b]ecause [Petitioner] sued [Respondents] for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if [Petitioner] goes forward with this claim of defective design." (Pet. App. at A10.)[5] Her claims were therefore preempted under the doctrine of implied conflict preemption, the court found. (*Id.* at A10-11.)

In reaching this conclusion, the court relied upon two well-founded principles that have long been adhered to by this Court. First, the Eleventh Circuit made no distinction between "law" emanating from a legislative or administrative body and "law" emanating from judgments and decisions of courts. It rightfully held that "common law liability may create a conflict with federal law, just as other types of state law can." (Pet. App. at A3 (internal quotations and citations omitted).) Second, while engaging in an analysis of implied conflict preemption, it did not forge a "presumption against preemption" where, by definition, the Supremacy Clause does not permit one. (*Id.* at A9-10.) That is, while the Eleventh Circuit recognized that a "presumption against preemption" may be appropriate in defining the scope of an express preemption provision, it nonetheless noted that where a conflict exists between state and federal law, the Supremacy Clause demands that the state law yield—that the state law be found, as this Court explained in *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981), "void" and "without effect." *See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 427 (1819).

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[5] Petitioner's appendices overlap at A10 and A11. That is, the last two pages of the Eleventh Circuit's opinion appear at A10 and A11, as do the first two pages of the District Court's Order. Unless otherwise noted, Respondents' citation to A10 or A11 will refer to the Court of Appeals' decision.

REASONS FOR DENYING THE PETITION

A. The Eleventh Circuit's Decision Is Correct And Consistent With Other Federal Appellate Courts' Decisions on Preemption.

All federal Courts of Appeals to consider the issue unanimously have held that a proposed state common law standard that is not identical to, or conflicts with, an applicable FMVSS is preempted under the Safety Act. *See Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998) (finding plaintiff's claim that the restraint system should have consisted of an automatic three-point belt or a manual three-point belt with an air bag impliedly preempted); *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 697 (1998) (holding non-identical and conflicting state common law standard on windshield retention strength expressly preempted); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997) (finding cause of action based on failure to install air bags expressly preempted); *Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 61 (1996) (impliedly preempting no air bag claim); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) (holding plaintiff's claim that the vehicle should have been equipped with a fully automatic seat belt or an air bag preempted under the doctrine of conflict preemption); *Taylor v. General Motors Corp.*, 875 F.2d 816(11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (holding no air bag claim impliedly preempted because it prohibited the exercise of a federally-granted option);[6] *Kitts v. General*

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[6] Petitioner makes the disingenuous argument that the Eleventh Circuit's holdings in *Irving* and *Taylor* represent not the law of the circuit, but the whims of the particular panels. (Pet. at 9 (citing *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996).) Petitioner is wrong. Neither the availability nor the propriety of implied conflict preemption was before the court in *Doyle*. Rather, the language relied upon by Petitioner is dictum, and inaccurate dictum, at that. *See Doyle*, 81 F.3d at 141 (relying

Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (impliedly preempting no air bag claim because it would conflict with FMVSS 208); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) (finding implied preemption of claim alleging failure to install an air bag).

Moreover, while this Court has not addressed the precise and narrow factual question of whether a manufacturer's compliance with the federally-approved option of an automatic shoulder and manual lap belt preempts a state common law claim seeking to impose liability based upon the manufacturer's failure to choose a different option, the Eleventh Circuit's decision is in harmony with this Court's decisions addressing analogous issues. *See American Tel. and Tel. Co. v. Central Office Tel., Inc.*, —— U.S. ——, 118 S. Ct. 1956, 1962-65 (1998) (preempting state law claims that sought to bar activity authorized by federal statute); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31-38 (1996) (preempting state law that prohiibted activity expressly permitted by federal statute); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-90 (1995) (finding no implied preemption when no FMVSS existed with which plaintiff's proposed common law standard could conflict); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-76 (1993) (holding that plaintiff's proposed common law standard basing tort liability on a train speed specifically permitted by an applicable

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upon this Court's affirmance of the Eleventh Circuit's *judgment* in *Feightliner Corp. v. Myrick*, 514 U.S. 280 (1995), for the proposition that standards promulgated under the Safety Act may never preempt common law claims). Not only did the Eleventh Circuit in *Doyle* misread this Court's decision in *Freightliner*, but once the Eleventh Circuit remanded *Doyle*, the District Court found plaintiff's claims impliedly preempted. *Doyle v. Volkswagenwerk Aktiengelellschaft*, No. 91:CV-1926A-JEC (N.D. Ga. Sept. 29, 1998). Thus, plaintiffs' claims in Georgia are not vulnerable to conflicting outcomes—regardless of the court and regardless of the appellate court panel.

federal standard was preempted); *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (finding preemption of common law claim seeking to prohibit use of due-on-sale clause explicitly permitted by federal statute); *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (holding that a state could not use "the threat of damages" to prevent the defendant from doing that which the federal agency specifically allowed under its duly-delegated authority).

1. ***The Court of Appeals Correctly Found That The Safety Act's Provision Negating A "Government Standards" Defense As A Matter of Federal Law Did Not Preclude Implied Preemption Analysis.***

Contrary to Petitioner's contentions, the Court of Appeals was correct in engaging in an implied analysis after declining to find Petitioner's claims expressly preempted. The Safety Act's provision relating to the availability of compliance with federal standards as an affirmative defense to common law claims does not, as Petitioner argues, preclude implied preemption analysis.[7] Petitioner attempts to argue that because the Court of Appeals did not find a sufficient expression of congressional intent to expressly preempt her claims, the court could not, and should not, have engaged in implied preemption analysis. This argument must fail.

This Court in *Freightliner* made clear that simply because a common law claim is found to be unaffected by an express preemption clause, a court is not free to disregard otherwise apparent implied preemption. *Freightliner*, 514 U.S. at 287-89 (holding that the presence of an inapplicable express preemption clause does not foreclose any possibility of implied preemption). Rather, this

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[7] The true meaning of this provision relating to compliance with federal standards—as identified through its language (both specific and nonspecific), structure, and purpose—goes far in discerning Congress' intent on the issue of preemption and is examined *infra*, Part B.

Court explained that its decision in *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive *effects*." *Id.* at 289 (citation omitted) (emphasis added).

Regardless of whether Congress included an explicit statement of its intent through an express preemption clause or a true savings clause, a federal statute may nonetheless have the *effect* of preempting conflicting state law—this is precisely what the Supremacy Clause envisions. Thus, this Court in *Freightliner* proceeded to examine the effect of the Safety Act's substantive regulations on plaintiffs' proposed common law standards even though the Court had found that express preemption was inapplicable based on the facts presented. *Id.* 289-90.

It is the Safety Act's potential for preemptive effect based upon the plain meaning of its language and the language of its duly-promulgated regulations, as the Eleventh Circuit correctly observed, that implicates the Supremacy Clause in its purest form and eliminates the judicially manufactured "presumption against preemption" in the context of conflict preemption. *Irving*, 136 F.3d at 769; *Taylor*, 875 F.2d at 826 (citing *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (internal quotations and citation omitted))); *accord Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992).[8] A judicial "presumption against preemption" cannot overcome Congress' constitutionally-delegated authority to set aside certain laws of a State or otherwise distort the unambiguous language and strength of the Supremacy Clause. U.S. Const., Art. VI, cl. 2.

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[8] *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying a presumption against preemption in interpreting an express preemption clause).

2. *The Court of Appeals Correctly Concluded That Petitioner's Claims Would Frustrate the Objectives of the Safety Act, Disrupt the Methods Carefully Chosen By The Federal Government for Achieving Those Objectives, and Impose Liability on Respondents For Doing What FMVSS 208 Authorized Them To Do.*

With its wholly appropriate conclusion that implied conflict preemption analysis in the context of the Safety Act was alive and well in Eleventh Circuit, the court below went on to find that Petitioner's proposed common law standards presented a formidable obstacle to the purposes, objectives, and very existence of FMVSS 208. *See Irving*, 136 F.3d at 768-69. The court rightfully recognized that the effect of allowing Petitioner's claims to go forward would be tantamount to proclaiming to Congress, the Department of Transportation, and the NHTSA that it knew better than they what methods should be used to achieve the objectives of the Safety Act. *Id.* Petitioner was, the court held, asking for the imposition of a state common law standard allowing manufacturers to be financially penalized "for doing what a federal act or regulation authorized them to do." *Id.* at 769 (quoting *Kalo Brick & Tile Co.*, 450 U.S. at 318).[9] This Court has rejected requests such as this rightfully and repeatedly. The Eleventh Circuit was correct to do so as well.

The task of the court below was straightforward: (1) to determine what Congress and the NHTSA had said about a manufacturer's ability to install an automatic

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[9] Petitioner points out—and Respondents concede—that Congress' intent, as evidenced in the language, structure, and purpose, is the determinative factor in any preemption analysis. Petitioner goes much farther in her argument, however, to make the novel and wholly unsupported statement that preemption cannot occur where Congress has evinced its intent through constitutionally-permissible delegations of authority to regulating agencies. (Pet. at 12.) This is a plain misstatement of the law. *See, e.g., de la Cuesta*, 458 U.S. at 153-54 (stating that "[f]ederal regulations have no less pre-emptive effect than federal statutes" and providing that a regulation's pre-emptive force does not depend on an "express congressional authorization to displace state law").

shoulder belt and manual lap belt in 1990 model year vehicles; (2) to determine what Petitioner's purported state common law standard would say about a manufacturer's ability to install an automatic shoulder belt and manual lap belt in 1990 model year vehicles; and (3) to determine whether the two were inconsistent in that it would be impossible for a party to comply with both or because the latter would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Kalo Brick & Tile Co.*, 450 U.S. at 319.

a. ***Petitioner's Proposed Common Law Standards Would Effectively Foreclose A Federally-Approved Option.***

In model year 1990, FMVSS 208 encouraged manufacturers to provide the public with a variety of specified restraint systems, including the system Respondents chose to install in the 1990 Mazda MX-6. Petitioner is asking this Court not only to invalidate that very restraint system, but to take away from automobile manufacturers and the public the right to choose from among the options specified in FMVSS 208. It is a right that the federal government deliberately established in order to promote federal safety policies, and a right that Petitioner cannot take away. *See Taylor*, 875 F.2d at 827 (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) ("[A] state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option.")).

By sanctioning a common law rule that would have required Respondents to have installed an automatic three-point belt or a manual three-point belt with an air bag in the 1990 Mazda MX-6, this Court would prevent the Safety Act in general, and FMVSS 208 in particular, from operating the way Congress intended it to operate.

First, Petitioner's proposed common law rule would foreclose manufacturers' use of a restraint system that the NHTSA specifically encouraged manufacturers to provide to consumers. Her common law rule would thus punish

Respondents and an array of other manufacturers for providing a restraint system that the federal government concluded was important to federal purposes and policies. *See Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *O'Bryan v. Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992); *cf. Perry v. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (recognizing that claims denominated as "design defect claims" will be preempted if the proposed alternative design creates an actual conflict wtih FMVSS 208 and the methods chosen by Congress to implement FMVSS 208). Petitioner is, in effect, second-guessing the judgment of the regulatory agency charged with carrying out the purposes and policies of Congress as set forth in the Safety Act, and eliminating the automatic shoulder belt as a viable option under FMVSS 208.

Second, Petitioner's proposed common law rule would undermine the methods the NHTSA has adopted to meet its charge by removing the principle of choice from FMVSS 208's regulatory framework. Because Congress and the NHTSA have determined that flexibility and choice are important components to FMVSS 208 and the Safety Act, Petitioner must not be allowed to destroy those components. *See Taylor*, 875 F.2d at 827 (holding that a state common law rule that would remove the element of choice from FMVSS 208 frustrates the regulatory scheme and is thus impliedly preempted); *Pokorny*, 902 F.2d at 1123-24 (finding that a common law rule requiring the installation of air bags or automatic seat belts when they were not required was impliedly preempted because it conflicted with the flexibility and choice of FMVSS 208).

For these reasons, this Court must reject Petitioner's attempt to rewrite the Safety Act and FMVSS 208, and leave standing the Eleventh Circuit's decision holding her claims impliedly preempted.

b. *Petitioner's Proposed Standards Would Eviscerate the NHTSA's Ability to Meet the Congressionally-Mandated Objective of Prescribing Standards for Motor Vehicles in Interstate Commerce.*

In stating the purpose and policy of the Safety Act, Congress found it necessary "to establish motor vehicle safety standards for motor vehicles and [motor vehicle] equipment in interstate commerce . . . ." 15 U.S.C. § 1381. That is, Congress deemed the subject matter of motor vehicle safety standards important enough to warrant nationwide action that would result in implementation of a uniform, nationwide policy. Petitioner's proposed common law rule, however, would defeat Congress' efforts to prescribe rules that are compatible with interstate commerce. To allow Petitioner's claim in this case to go forward would, in effect, give litigants across the country "line-item veto" power over federal regulations. The effect of allowing plaintiff here to go forward is contrary to both law and logic.

c. *Petitioner's Proposed Standards Would Wreak Havoc, Retrospectively, on the Federal Government's Phase-In of Passive Restraint Systems.*

Even when the Department of Transportation judged that passive restraints, and later air bags, would be appropriate, it planned implementation of these standards carefully. Passive restraints were to be phased in, beginning with only 10% of cars built in 1987. *See* 49 Fed. Reg. 28962, 28999-29000. And in 1991, when Congress mandated air bags in all cars, it provided a six-year lead-in time and then a phase-in. *See* Pub. L. No. 102-240, § 2508.[10]

When the 1990 Mazda MX-6 was built, the passive restraint phase-in was just concluding, and the air bag

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[10] These lead-in times were calculated carefully, and were necessary for two reasons: (1) "for the public to become accustomed to the technology and the need for protection"; and (2) to promote a variety of different systems and to "encourage the development of [restraint] technologies." *E.g.*, 49 Fed. Reg. 28962, at 28989 and 28997.

phase-in was not to begin until six years later. Nonetheless, Petitioner seeks to impose liability on Respondents that would have the effect of requiring air bags before the air-bag phase-in period began, thereby nullifying FMVSS 208's lead-in time. Petitioner's "no air bag" claim, if allowed, would open the door to a wholesale dismantling of an implementation schedule carefully crafted by Congress to meet the goals of the Safety Act. Petitioner must not be allowed to so disrupt the methods chosen by Congress and the NHTSA to achieve the Safety Act's objectives; this Court must turn back her request to revisit the Court of Appeals' sound decision.

B. The Eleventh Circuit's Decision Gives Effect to Congress' Intent As Expressed in 15 U.S.C. §§ 1392(d) and 1397(k), and to the Rule of Construction Directing That An Act Cannot Be Held to Destroy Itself.

Although the court below based its finding of preemption on implied conflict preemption, an examination of Congress' intent with respect to the scope of what would be characterized as express preemption reveals that the Court of Appeals' decision gives full effect to that intent.[11] When ascertaining congressional intent in the context of the express preemption doctrine, courts should look primarily to the language of the statute's preemption clause and the statutory framework surrounding the clause. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Courts should also consider, however, "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect

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[11] While Respondents did not cross-petition on the Court of Appeals' finding that express preemption was inapplicable here, the meaning of the Safety Act's express preemption clause is a necessary predicate to proper analysis of Petitioner's first and third questions presented. (Pet. at i.)

business, consumers, and the law." *Id.* (internal quotations and citations omitted).[12]

Congress conveyed its clear intent that the Safety Act preempt certain state law by including in the Act an express preemption clause providing that:

> Whenever a Federal motor vehicle safety standard . . . is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The preemption provision is followed immediately by two savings clauses not applicable here. See 15 U.S.C. § 1392(d).[13] Elsewhere, the Act negates compliance with the Federal Motor Vehicle Safety Standards as an affirmative defense by stating, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

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[12] *See also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (recognizing that "more often than not, explicit pre-emption language does not directly answer the question of whether Congress intended to preempt state law"). In these instances, the Court has admonished that resort must be had to the federal statute's structure and purpose and "nonspecific statutory language" to determine whether Congress' intent to preempt was implicit. *Id.*

[13] These savings clauses provide as follows:

> Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d).

1. *The Language and Structure of the Safety Act Provide Reliable Indicia of Congress' Intent That § 1392(d) Serve As A Meaningful Preemption Clause and That the "No-Compliance-Defense" Provision of § 1397(k) Not "Save" Otherwise Preempted Claims.*

While the court below declined to construe the Safety Act as "unambiguously manifesting" an intent to expressly preempt state common law claims that proposed state standards different from applicable, on-point federal standards, an examination of Congress' intent with respect to the Safety Act confirms the propriety of the Court of Appeals' ultimate conclusion. Here, the language and structure of the Safety Act, and the Act's legislative history, show that § 1397(k) is not, and was not intended to be, a provision that relates to the issue of preemption. Rather, § 1397(k) merely negates the availability of compliance with government standards as an affirmative defense to common law actions. *Compare* 15 U.S.C. § 1392(d) (containing the Act's true savings clauses), *with* 15 U.S.C. § 1397(k) (stating that no person may be exempted from common law liability by complying with federal standards).

First, the language of the Act's true savings clauses differs radically from the affirmative-defense-oriented "compliance with" language of § 1397(k). Like so many other true savings clauses, the language of § 1392(d) employs the traditional, sweeping, and unambiguous anti-preemption language, stating "[n]othing in this section shall be construed [to preempt certain conflicting state standards]." [14] In contrast, the more diffuse language of the

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[14] An array of federal statutes uses similarly categorical and encompassing language to "save" certain state common law claims from that statute's preemptive reach. *See, e.g.*, 29 U.S.C. § 1144(b)(2)(A) (Employee Retirement Income Security Act's savings clause); 29 U.S.C. §§ 653(b)(4) and 667(a) (Occupation Safety and Health Act's savings clauses); 49 U.S.C. § 1506 (Federal Aviation Act of 1958's savings clause); 42 U.S.C. §§ 2000e-7 and 2000h-4 (Civil Rights Act of 1964's savings clauses); 46 U.S.C. § 767 (Death on the High Seas' savings clause); *cf. Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996) (describing the

"compliance with . . . does not exempt" provision belies its function as having anything to do with preemption. Rather, that language conveys its function of preventing a manufacturer from asserting compliance as a general affirmative defense to a common law claim, regardless of the lack of conterminousness between the proposed state standard and the federal standard.[15] *See* S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352 (construing the Federal Boat Safety Act's similar no-compliance-defense provision as precluding the assertion of compliance as a complete defense). That is, the language of § 1397(k) clearly is not the language commonly employed by Congress when it intends to limit the scope of preemption; it makes no reference to preemption or the limits of federal supremacy under § 1392(d). Instead, the language simply forecloses, as a matter of federal law, the availability of compliance as a complete affirmative defense to a constitutionally-permissible state common law claim.

Second, the structure of the Act supports the view that Congress did not intend for § 1397(k) to be applied as a sweeping savings clause. In addition to the fact that the language of § 1392(d) has nothing to do with § 1397(k), and vice versa, the two provisions appear five full sections apart from each other. Moreover, a comparison of the language used by Congress in the two structurally-independent sections makes two obvious points: (a) Congress knew precisely how to limit the scope of the Act's express preemption clause by virtue of the two true, explicit savings clauses contained in § 1392(d); and (b) Congress chose not to use that explicit savings language in § 1397(k). Thus, had Congress intended the substance

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McCarran-Ferguson Act's "anti-preemption" rule as explicitly stating that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any [state] law.").

[15] The parallel language now found at 49 U.S.C. § 30103(c) (stating that the Safety Act cannot exempt a person from liability under antitrust laws) supports this interpretation.

of § 1397(k) to represent a third—and the most sweeping—exception to the preemption provision in the first sentence of § 1392(d), Congress most certainly would have included the language of § 1397(k) in its logical location—adjacent to the other two explicit savings clauses in the section entitled "Supremacy of federal standards." [16]

Third and finally, the legislative history of § 1397(k) further demonstrates that § 1397(k) is not, and was not intended to be, a provision that had anything whatsoever to do with the Act's preemptive reach.[17] Both the House and Conference reports contain sections entitled "Preemption." *See* H.R. Rep. No. 89-1919, at 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 89-1776, at 17 (1966). Neither of these sections, however, even mentions § 1397(k); they discuss only § 1392(d), the Safety Act's only provision addressing the scope of preemption under the Act. The House report finally discusses § 1397(k) seven pages later under the heading "Prohibited Acts and Exemptions," and the conference report does not even address it.

Senator Magnuson's description of § 1397(k) lends additional support to the fact that Congress did not consider § 1397(k) to be related to preemption:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle

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[16] The true preemption provision, § 1392(d), is unmistakably entitled "Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments," whereas the title of § 1397(k) simply reads "Continuation of common law liability," without making any reference to the Supremacy Clause or preemption. *See I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (using title of statute or section to aid in resolving ambiguity in statute's text).

[17] Because § 1397(k) was added to the Senate bill after the House and Senate conference, the Senate report contains no discussion of the provision.

> developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966). The principle to which Senator Magnuson referred stated that federal safety standards "*need not* be interpreted as restricting state common law standards of care" and that "[c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). In other words, the addition of § 1397(k) was intended merely to clarify that the Safety Act did not create an affirmative defense of compliance with government standards or, at most, that the Act's preemption provision did not occupy the field, and thus did not "*necessarily*" protect a common law defendant.[18]

This interpretation of the interplay between the preemption provision and the no-compliance-defense provision is borne out by two federal Courts of Appeals' express preemption analysis in the context of the Safety Act post-*Medtronic*. *See Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997). As the Ninth Circuit wrote in *Harris*:

> True, § 1397(k) states that compliance with Federal standards 'does not exempt any person from any liability under common law.' To be 'exempted' from liability, however, one must first be subject to it. And § 1392(d) removes the States' authority to subject anyone to liability for the breach of non-identical

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[18] If § 1397(k) *always* precluded preemption of *any* common law claim, Congress' qualification of "need not" and "not necessarily" would be not only superfluous, but internally inconsistent as well. On the other hand, if the provision merely negates compliance as a defense at trial, or precludes only field preemption, then the quoted legislative history is eminently sensible.

> safety standards. The most reasonable and plausible reading of § 1397(k), therefore, is that compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose.

Harris, 110 F.3d at 1415; *cf.* S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352 (interpreting Federal Boat Safety Act's no-compliance-defense provision similar to the Safety Act's and acknowledging that the provision is designed to "assure that . . . mere compliance by a manufacturer with minimum standards under the Act will not be complete defense to liability)). The Ninth Circuit made the painfully obvious, albeit long-overlooked, point that the possibility of being "exempted" from liability presupposes that the state has the authority to impose such liability. *Id.*[19] The Ninth Circuit is perfectly correct—under the Supremacy Clause, state enactments, including common law standards, that conflict wih an applicable, on-point federal safety standard are "void" and "without effect." *Id.* Congress' powers are not so great that it could have designed the Safety Act's no-compliance-defense provision to override the Constitution.

2. *Congress' Intent In Providing For Preemption Under the Safety Act Is Wholly Consistent With The Rule That An Act Should Not Be Held To Destroy Itself.*

The Court of Appeals' decision below, while reaching the correct result, simply did not articulate properly Congress' intent as evidenced by the plain language of the Safety Act, and the structure and purpose of the Act. It chose instead to ascribe meaning to both the preemption and the no-compliance-defense provisions by concluding that the combination of the two prevented a finding of a sufficiently clear congressional intent to expressly preempt common law claims.[20] The result reached

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[19] *See also Webster's Ninth New Collegiate Dictionary* 434 (1986) (defining "exempt" as "free or released from some liability or requirement to which others are subject").

[20] The Court of Appeals did not say as much, but lurking beneath its conclusion that § 1392(d) and § 1397(k) provided conflicting

by the Court of Appeals and the more sound reading of the two provisions are bolstered, however, by a familiar and long-standing rule of statutory construction—namely, that an act cannot be held to destroy itself. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *accord American Tel. and Tel. Co. v. Central Office Tel., Inc.*, —— U.S. ——, 118 S. Ct. 1956, 1964-65 (1998).

As Petitioner would have it, the Eleventh Circuit should have ignored both the preemptive intent of Congress and the preemptive effect of the statute, as well as the rule that a statute should not be interpreted to strip itself of its substance and intended efficacy. (Pet. at 16.) This Court's teachings, however, demand that Congress' intent be honored—that the express preemption provision in § 1392(d) and the provision in § 1397(k) precluding, as a matter of federal law, compliance with government standards as an affirmative defense mean what they say. *Compare Cipollone*, 505 U.S. at 521 (holding that a term such as "requirement" "sweeps broadly and suggests no distinction between positive enactments and common law" but rather "easily encompass obligations that take the form of common law rules") (plurality opinion), *with Central Office Tel., Inc.*, 118 S. Ct. at 1965 (ruling that a savings clause "cannot in reason be construed as continuing in [litigants] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act") (quoting *Abilene Cotton*, 204 U.S. at 446 (internal quotations omitted)).

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evidence of Congress' intent is the untenable distinction between positive enactments and common law. This Court has disabused federal courts of the notion, however, that terms such as "standard," "requirement," and "prohibition" do not bespeak standards and requirements established by the common law. *See Medtronic*, 518 U.S. at 503-05 (Breyer, J. concurring in part and concurring in the judgment); *Cipollone*, 505 U.S. at 521 (plurality opinion), and 548-49 (Scalia, J., and Thomas, J., concurring in the judgment in part and dissenting in part).

C. The Question of Whether FMVSS 208 Preempts Claims Such As Petitioner's Will Become Increasingly Rare and Unimportant By Virtue of FMVSS 208's Currently-Effective Mandatory Air Bag Rule and Thus Does Not Merit Review By This Court.

Respondents acknowledge that a handful of decisions from the highest courts of certain states have taken a position that is inconsistent with the Court of Appeals' decision below, while still other state appellate and supreme courts have followed the federal appellate courts' proper path. (*See* Pet. at 8-9 (citations omitted).) This handful of dissenting state supreme courts does not justify this Court's review of the decision below, however, for one powerful reason. That reason is the ephemeral nature of the factual context in which preemption presented itself in this case. Any decision by the Court here would lack the staying power and gravity that should accompany the Court's pronouncements.

This case and the seven others like it—where this Court has denied a petition for a writ of certiorari—involve the preemptive effect of various occupant restraint system options under FMVSS 208. Typically, as is the situation here, the petitioner alleges that rather than choosing the federally-approved option that it did, the manufacturer should have chosen to install an air bag.[21] *See Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989); *cert. denied*, 494

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[21] Petitioner did not addrses her second question presented—whether her failure to warn claim was preempted—in her brief. As the Eleventh Circuit observed, the answer to this question was purely a function of Georgia law and the peculiar evidence adduced by Petitioner in the trial court. *Irving*, 136 F.3d at 769-70. These facts show beyond doubt that Petitioner's second question presented does not approach certworthiness.

U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *cf. Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 1245 (1997) ("no lap belt" claim); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, *pet. for reh'g denied*, 516 U.S. 1154 (1996) (letting stand a state court decision finding no preemption of a "no air bag" claim).

The ever-evolving character of FMVSS 208 demonstrates, however, that claims presented by the cases above will slowly but surely fall by the wayside as vehicles manufactured before air bags were mandatory cease to be driven. *See* Pub. L. No. 102-240, § 2508 (requiring air bags in 100% of passenger vehicles manufactured in model year 1998). Thus, any pronouncement by the Court on the issues presented here will likewise fade in its usefulness. Petitioner has presented no reason why this Court should depart from its seven previous decisions to deny similar petitions. This Court should not change course and exercise its discretionary powers to render a decision that will face inevitable obsolescence.

CONCLUSION

Based upon the foregoing, review by this Court is neither necessary nor appropriate. Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

LANNY B. BRIDGERS *
ANDREW T. BAYMAN
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Attorneys for Respondents

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* *Counsel of Record*